A **FOO TSEH WAN v. TOYOTA TSUSHO (M) SDN BHD & ANOR**

HIGH COURT MALAYA, JOHOR BAHRU
COLLIN LAWRENCE SEQUERAH J
[CRIMINAL APPLICATION NO: JA-44-59-07-2017]
19 SEPTEMBER 2017

B

CIVIL PROCEDURE: *Sessions Court – Jurisdiction – Applicant sought revision of Sessions Court's order in allowing applicant's statement to be tendered in a civil suit – Applicant made statement pursuant to s. 53(3) of the Malaysian Anti-Corruption Commission Act 2009 – First respondent applied to Criminal*
C *Sessions Court for applicant's statement to be used in a civil suit – Whether Sessions Court Judge had jurisdiction to hear and grant orders sought – Whether there was originating process or existing civil suit before court – Whether first respondent had locus standi before Criminal Sessions Court – Failure to cite applicant as party in proceedings – Whether statement given by applicant a privileged document and*
D *could not be used at trial in Civil High Court – Whether order made by Sessions Court in exercise of its criminal jurisdiction in granting reliefs ultra vires and wrong in law – Malaysian Anti-Corruption Commission Act 2009, ss. 10(4)(b), 10(5) & 30 – Criminal Procedure Code, s. 113*

CRIMINAL PROCEDURE: *Statements – Admissibility – Applicant made*
E *statement pursuant to s. 53(3) of the Malaysian Anti-Corruption Commission Act 2009 – First respondent applied to Criminal Sessions Court for applicant's statement to be used in a civil suit – Whether statement given by applicant a privileged document and could not be used at trial in Civil High Court – Voluntariness of statement – Whether could be determined – Malaysian Anti-Corruption*
F *Commission Act 2009, ss. 10(4)(b), 10(5) & 30 – Criminal Procedure Code, s. 113*

The first respondent instituted civil proceedings ('the civil suit') against the applicant for, *inter alia*, breach of fiduciary duty and was claiming damages amounting to RM179,989.92. On 14 July 2015, the applicant made a statement ('the applicant's statement') pursuant to s. 53(3) of the Malaysian
G Anti-Corruption Commission Act 2009 ('MACC') where the applicant was charged with 142 charges under s. 18 of the MACC and 27 charges under s. 4(1)(b) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities 2001 ('AMLATFA'). In early 2017, the first respondent made an application, in the civil suit, for the applicant's
H statement to be used therein ('the first application'). However, the first respondent subsequently withdrew its first application. The first respondent then made an application in the Criminal Sessions Court in Johor Bahru for the applicant's statement to be used in the civil suit ('the second application') but failed to attend the hearing and thereby, the said application was struck
I out. The first respondent then filed a notice of application, to the Criminal Sessions Court in Johor Bahru, again for the applicant's statement to be used in the civil suit ('the third application'). The Sessions Court Judge ('SCJ')

allowed the application. Hence, the applicant sought a revision of the SCJ's order in allowing the applicant's statement to be tendered in the civil suit brought by the first respondent against the applicant. The issues that arose were (i) whether the SCJ had the necessary jurisdiction to hear and grant the orders sought in the third application; (ii) whether a party holding a watching brief has the right to make applications in a criminal trial; (iii) whether the declaratory order was invalid on the ground that it was granted without the person affected by the order, namely the applicant, having been cited as a party to the proceedings; (iv) whether the order was invalid on the ground that the applicant's statement was a privileged document and therefore could not be ordered to be used in the civil suit; (v) in the alternative, does s. 113 of the CPC, read together with s. 10(5) and s. 53(3) of the MACC, operate so as to prohibit the production of the applicant's statement in the civil suit; and (vi) if the High Court in the civil suit had no mechanism by which to test the voluntariness of the applicant's statement, could the statement still be produced in the civil suit.

Held (granting reliefs sought in notice of motion; setting aside decision of Sessions Court):

(1) The Sessions Court, in exercising its criminal jurisdiction, was not seised with the jurisdiction to hear the first respondent's application as there was no originating process and/or existing civil suit before the said court. The originating process was the criminal charges brought against the applicant. This resulted in the Sessions Court's exercise of its criminal jurisdiction and not its civil jurisdiction, the latter of which would entitle a declaration to be issued. The first respondent's notice of application was a mere subsidiary process and must have had, as its basis or foundation, an originating process of some kind or other. Logically, it could not stand on its own. It must be anchored to an originating process. As no civil originating process was invoked by the Sessions Court upon the application of the first respondent, the order made by the Sessions Court in the exercise of its criminal jurisdiction in granting the reliefs were therefore *ultra vires* and wrong in law. (paras 29, 31-33)

(2) Although the applicant was a person whose legal rights were clearly and directly affected by the order, he was not cited as a party in the proceedings. It was necessary for the respondent to have named the applicant as a party. As this was not done, the declaration served no useful purpose. The SCJ had no jurisdiction to grant the orders that he did. (paras 34, 37-38)

(3) In the notice of application filed before the Sessions Court, apart from citing that the matter was before the Special Corruption Sessions Court, the arrest case number and that the matter was between the Public Prosecutor and the applicant, there were no other intitulements. There were no references made to any provisions of law including the Criminal

Procedure Code ('CPC'). As there was nothing in the intitulement nor in the CPC upon which to hinge the applicant's application, it must therefore fall like the proverbial deck of cards. (paras 39 & 45)

(4) Unless invited to do so at the behest of the court, a party holding a watching brief cannot address the court and his role is confined strictly and defined by the very expression 'watching brief' itself and that is to merely watch or observe proceedings notwithstanding his interest in the outcome. This being the case, it was patently wrong for the SCJ to have entertained the first respondent's application, let alone to have allowed such application. The issue was one of *locus standi* which a party holding a watching brief does not possess. (paras 49 & 50)

(5) A necessary corollary of the absolute prerogative of the AG to prosecute is that as a general rule, private persons or entities do not have the *locus standi* to institute criminal prosecutions or proceedings or be involved in any manner save as provided for. The first respondent therefore did not have *locus standi* before the Criminal Sessions Court. Thus, if the first respondent did not possess the necessary *locus standi* to institute a criminal prosecution, it could not also possess any authority or *locus standi* to make any application for any declaratory reliefs. (paras 66 & 70)

(6) The statement given by the applicant pursuant to the combined provisions of ss. 10(4)(b), 10(5), 30 and 53(1) of the MACC read together with s. 113 of the CPC were similarly, absolutely privileged. The statement therefore could not be used at the trial in the Civil High Court. Pursuant to s. 53(1) of the MACC, the statement was only admissible at the trial of the applicant and, if he tendered himself as a witness, the statement may be used in cross-examination and for the purpose of impeaching his credit. The trial referred to mean the trial of the applicant at the Criminal Sessions Court and not in any other court. The fact that the document was given in pursuance to s. 51A of the CPC made no difference to the outcome as a complainant had no right to such document. (paras 89, 90, 92 & 97)

(7) A High Court engaged in the exercise of its civil jurisdiction could not determine the admissibility of such a statement simply because, quite apart from the fact that no mechanism exists for the purpose, such an issue was also not relevant to a civil trial. It would, however, be relevant before a criminal court in which the accused was being tried and the issue of voluntariness of the statement arose. Thus, the statement could not be used in a trial before the High Court hearing the civil matter. (paras 102 & 103)

(8) The court's powers of revision are confined to cases where a prevention or correction of a miscarriage of justice is necessary. This was one such case. The fact that the second respondent had no objection to the application and the first respondent's counsel was absent although there was proof of service made no difference as the Sessions Court had acted without jurisdiction in granting the orders. (para 105)

Case(s) referred to:

Bar Malaysia v. Peguam Negara Malaysia & Anor [2017] 1 LNS 578 HC ***(refd)***
Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor [1987] 2 CLJ 36; [1987] CLJ (Rep) 504 HC ***(refd)***
Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA (refd)
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Dato' Sabariah Sabtu v. Peguam Negara & Ors and Other Appeals [2016] 7 CLJ 655 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2003] 4 CLJ 409 CA ***(refd)***
Dato' Yap Peng v. PP [1993] 2 CLJ 181 HC ***(refd)***
Datuk Mohd Zaid Ibrahim v. Peguam Negara Malaysia [2016] 1 LNS 1817 HC ***(refd)***
Director of Public Prosecutions v. Ping Lin [1975] 3 All ER 175 ***(refd)***
Husdi v. PP [1979] 1 LNS 33 HC ***(refd)***
Ibrahim v. R [1914] AC 599 ***(refd)***
Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***
Ketua Pengarah Imigresen Malaysia lwn. Heng Peo [2007] 2 CLJ 111 CA ***(refd)***
Khairuddin Abu Hassan v. Tan Sri Mohamed Apandi Ali [2017] 4 CLJ 761 HC ***(refd)***
Lim Kiang Chai v. PP [2014] 3 CLJ 102 CA ***(refd)***
Makanjuola v. Commissioner of Police of the Metropolis [1992] 3 All ER 617 ***(refd)***
Martin Rhienus v. Sher Singh [1949] 1 LNS 49 HC ***(refd)***
MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No. 12) [1998] 4 CLJ 906 HC ***(refd)***
Methuram Dass v. Jaggannath Dass (1901) ILR 28 Cal 794 ***(refd)***
PP v. Kulasingam [1974] 1 LNS 118 HC ***(refd)***
PP v. Ottavio Quattrocchi [2004] 3 CLJ 553 FC ***(refd)***
Smt Rama Sharma v. Pinki Sharma And Ors 1989 Cri LJ 2153 ***(refd)***
Uthayakumar Ponnusamy v. YAB Dato' Sri Najib Tun Razak, Perdana Menteri Malaysia & Ors [2017] 6 CLJ 297 CA ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 4(1)(b)
Criminal Procedure Code, ss. 51A, 112(1), 113, 323, 325, 376
Evidence Act 1950, s. 74
Extradition Act 1992, s. 41(1)
Federal Constitution, art. 145(3)
Malaysian Anti-Corruption Commission Act 2009, ss. 10(4)(b), (5), 18, 30, 53(1), (2), (3)
Specific Relief Act 1950, s. 41
Subordinate Courts Act 1948, ss. 63, 65(5)(b), 69

Other source(s) referred to:
Mallal's Criminal Procedure, 7th edn, p 581
Watching Briefs ... Indulgence, Right or Potential Estoppel? [1991] MLJ clxi

For the applicant - Kamarul Hisham Kamaruddin, Elina Abdul Rashid & Tiara Katrina; M/s The Chambers of Kamarul Hisham & Hasnal Rezua
For the 1st respondent - Magita Hari Mogan & Ragunath Kesavan; M/s Skrine
For the 2nd respondent - Khazrin Haffiz Khalil; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah J:

Introduction

[1] This is an application by the applicant for revision of orders made by the learned Sessions Court Judge ("SCJ") on 20 July 2017.

[2] The reliefs sought for in the said application *vide* a notice of motion dated 24 July 2017 are set out hereunder in Bahasa Malaysia as follows:

(a) Bahawa kebenaran yang diberikan oleh Hakim Mahkamah Sesyen Khas Rasuah Johor Bahru pada 20.7.2017 yang membenarkan Responden dalam kapasitinya sebagai peguam pemerhati di dalam perbicaraan kes No: 62R-2-03-2016 untuk membuat permohonan bagi menggunakan Pernyataan Pemohon bertarikh 14.7.2015 di bawah Seksyen 53(3) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dalam guaman sivil No: 22NCC-216-07-2015 yang dibuat oleh Responden keatas Pemohon dan 19 lagi yang sedang berjalan di Mahkamah Tinggi Malaya di Kuala Lumpur (Bahagian Dagang) diketepikan dan dibatalkan;

(b) Bahawa perintah yang dikeluarkan oleh Mahkamah Sesyen Khas Rasuah Johor Bahru bertarikh 20.7.2017 yang membenarkan penggunaan Pernyataan Pemohon bertarikh 14.7.2015 di bawah Seksyen 53(3) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dalam guaman sivil No: 22NCC-216-07-2015 tersebut diketepikan dan dibatalkan; dan

(c) Lain-lain relif yang difikirkan patut dan sesuai oleh Mahkamah yang Mulia ini.

[3] In summary, the applicant is seeking a revision of the SCJ's order in allowing the applicant's statement given on 14 July 2015 pursuant to s. 53(3) of the Malaysian Anti-Corruption Commission Act 2009 ("MACC") where the applicant is charged with 142 charges under s. 18 of MACC and 27 charges under s. 4(1)(b) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFA"), to be tendered in (Civil Suit No: 22NCC-216-07-2015) ("the civil suit") brought by the first respondent against the applicant for, *inter alia*, breach of fiduciary duty and a claim for damages amounting to RM179,744,989.92.

Facts Giving Rise To This Application

[4] The facts giving rise to this application were as follows:

(a) In 2015, the first respondent instituted civil proceedings (Civil Suit No: 22NCC-216-07-2015) ("the civil suit") against the applicant for, *inter alia*, breach of fiduciary duty and is claiming damages amounting to RM179,744,989.92.

(b) On 14 July 2015, the applicant made a statement ("the applicant's statement") pursuant to s. 53(3) of the Malaysian Anti-Corruption Commission Act 2009 ("MACC").

(c) The applicant was charged with 142 charges under s. 18 of MACC and 27 charges under s. 4(1)(b) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFA").

(d) In early 2017, the first respondent made an application, in the civil suit, for the applicant's statement to be used therein ("the first application"). The High Court set 21 February 2017 as the date of the hearing for this application. On the date thereof, the first respondent withdrew its first application.

(e) The first respondent then made an application, in the Criminal Sessions Court in Johor Bahru, for the applicant's statement to be used in the civil suit ("the second application"). However, the first respondent did not attend the hearing on 20 June 2017, and the learned Sessions Court Judge thereby struck out the application.

(f) On 30 June 2017, the first respondent filed a notice of application to the Criminal Sessions Court in Johor Bahru, again for the applicant's statement to be used in the civil suit ("the third application").

(g) The SCJ allowed the application by the first respondent on 20 July 2017.

The Issues

[5] The issues to be determined are aptly set out in the submissions of the applicant as follows:

(a) Did the Sessions Court Judge have the necessary jurisdiction to hear and grant the orders sought in the third application?

(b) Does a party holding a watching brief have a right to make applications in a criminal trial?

(c) Insofar as the orders sought is declaratory in nature, is the declaratory order dated 20 July 2017 invalid on the ground that it was granted without the person affected by the order, namely, the applicant, having been cited as a party to the proceedings?

(d) Is the order dated 20 July 2017 invalid on the ground that the applicant's statement is a privileged document and therefore cannot be ordered to be used in the civil suit?

(e) In the alternative, does s. 113 of the CPC, read together with s. 10(5) and s. 53(3) of the MACC, operate so as to prohibit the production the applicant's statement in the civil suit?

(f) If the High Court in the civil suit has no mechanism by which to test the voluntariness of the applicant's statement, can that statement still be produced in the civil suit?

Parties Submissions

Applicant

[6] In summary, the applicant submitted that the SCJ lacked jurisdiction to make the orders that he did. In pursuing this argument, it was contended that there exists no statutory mechanism which entitles the first respondent to ask permission from a Criminal Sessions Court to allow a s. 53(3) statement to be adduced in a related civil proceeding *vide* its notice of application dated 30 June 2017.

[7] It was submitted also that the SCJ had erred in granting the application as it was made outside the scope of the criminal jurisdiction of the Sessions Court as prescribed under s. 63 Subordinate Courts Act 1948 ("SCA"), mainly, its criminal jurisdiction which is only limited to trying of offences.

[8] It was further submitted that the third application took the form of a notice of application which is not an originating process. The originating process, it was contended, are in fact the charges brought against the applicant, triggering the criminal jurisdiction of the Sessions Court. The Sessions Court therefore is only limited to act within its criminal jurisdiction. Consequently, the Sessions Court in allowing the respondent's application has acted without jurisdiction and accordingly the order made was invalid.

[9] The applicant also said that the first respondent's notice of application in the Sessions Court is a subsidiary process which must draw its life from the originating process. In the event, it was submitted that the application was flawed.

[10] It was further argued that the first respondent had failed to state sufficient and/or correct intitulements in the application before the Sessions Court. Such failure, it was contended, amounted to more than a mere irregularity and could not be cured.

[11] The applicant in furthering their submission, said that the contention of the first respondent that it is "entitled" to make the application in the Sessions Court to adduce the applicant's statement in the civil suit, in its capacity as watching brief, because the first respondent is, "the complainant

and the victim of the acts committed by the applicant" is flawed because a party holding a watching brief possesses no rights to make applications in a criminal trial.

[12] The applicant also submitted that the contention of the first respondent that they had the necessary *locus standi* to make such an application cannot hold true in light of the prosecutorial prerogative of the Attorney General under art. 145(3) of the Federal Constitution.

[13] The applicant took as their next point the fact that the applicant, a person whose legal rights are directly affected by the said order, was not cited as a party in the proceedings in the application. It was submitted therefore that the SCJ had erred in law in granting the order.

[14] It was next submitted by learned counsel for the applicant that as the applicant's statement was taken pursuant to s. 30 and s. 53(1) of the MACC, read together with s. 112(1) of the Criminal Procedure Code, it was a privileged document.

[15] It was finally submitted that since there is no such mechanism available within a civil trial to determine the admissibility of statements through a *voir dire* made for the purpose of criminal proceedings, the applicant's statement is therefore inadmissible in the civil suit.

First Respondent

[16] In summary, the first respondent submitted that the application for revision ought to be dismissed for the following reasons:

(a) The first respondent, as the complainant in the criminal case, had *locus standi* to make the said application;

(b) The order was granted by the Sessions Court Judge upon hearing the first respondent's oral submission, the first respondent's written submissions and taking into consideration the fact that the second respondent had no objection to the said application;

(c) The applicant had the opportunity to be heard during the hearing of the first respondent's application. However, while the appellant was present in court, his counsel failed to attend court during the hearing. Further, the appellant did not file any affidavit in reply nor did the appellant notify any of the parties of their objections to the application by the first respondent;

(d) The order granted by the Sessions Court Judge was in accordance to the law since:

(i) The s. 53(3) statement is not a privileged document;

(ii) There is no express prohibition under the MACC Act to prevent the disclosure and/or use of the s. 53(3) statement that was obtained during investigation; and

(iii) The disclosure is for a *bona fide* and related purpose.

[17] The second respondent did not wish to address the court and left it to the court to make whatever order it deemed fit.

Analysis And Findings

Court's Revisionary Powers

[18] At the outset, it is necessary to be reminded that what is sought to be invoked are the revisionary powers of this court pursuant to s. 323 of the Criminal Procedure Code ("CPC"). The powers of a judge upon revision are contained in s. 325 of the CPC which reads:

325. Powers of judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had on opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

[19] These powers were also explained by Hashim Yeop Sani J (as he then was) in *PP v. Kulasingam* [1974] 1 LNS 118; [1974] 2 MLJ 26 as follows:

> The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to sub-sections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

[20] *Mallal's Criminal Procedure*, 7th edn at p. 581 in explaining the difference between appellate and revisional jurisdiction stated:

> In an appeal it is the duty of the appellate court to examine the evidence and come to an independent finding on each issue of fact but a court sitting in revision deals with questions of evidence or disturbs the finding of fact by the lower court only in very exceptional cases, to prevent a miscarriage of justice.

[21] The principle objective then of the revisionary powers of the court is to correct or prevent a miscarriage of justice.

The Jurisdictional Issue

The Criminal Sessions Court Had No Declaratory Powers

[22] Section 41 of the Specific Relief Act 1950 ("SRA") states the following in respect of declaratory orders:

> 41. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[23] The reliefs sought for and obtained were for the purpose of establishing the entitlement of any legal character or to the right of a party to property, namely, the right of the first respondent to adduce the statement of the applicant at the High Court civil trial. It was clear therefore that the reliefs obtained were declaratory in nature.

[24] The applicant also submitted that as the Criminal Sessions Court had no jurisdiction or authority to order the High Court to adduce the applicant's statement in the civil suit, its order was merely declaratory in nature and effect.

[25] The powers of the Criminal Sessions Court are contained in s. 63 of the Subordinate Courts Act 1948 ("SCA 1948") which states:

> 63. Criminal jurisdiction
>
> A Sessions Court shall have jurisdiction to try all offences other than offences punishable with death.

[26] Section 69 SCA 1948, on the other hand, reads:

> 69. Exceptions to jurisdiction
>
> Sessions Courts shall have no jurisdiction in actions, suits or proceedings of a civil nature:
>
> ...
>
> (g) for declaratory decrees except in making a declaration under paragraph 65(5)(b) and interpleader proceedings under section 73

[27] Section 65 SCA 1948 provides as follows:

> 65. Civil jurisdiction of Sessions Court
>
> …
>
> (5) A Sessions Court may, in respect of any action or suit within the jurisdiction of the Sessions Court, in any proceedings before it:
>
> (a) grant an injunction; and

A (b) make a declaration,

whether or not any other relief, redress or remedy is or could be claimed.

[28] As can be discerned, the criminal jurisdiction of the Sessions Court is only limited to trying of offences. It is to be noted that s. 65(5)(b) empowers the Sessions Court to make a declaration only within its civil jurisdiction. Therefore, insofar as the first respondent's application was made within the criminal jurisdiction of the Sessions Court, the order made by the SCJ was made outside of its scope and therefore without jurisdiction.

C There Was No Originating Process Before The Civil Sessions Court

[29] The applicant also contended that the Sessions Court, in exercising its criminal jurisdiction, was not seised with the jurisdiction to hear the first respondent's application as there was no originating process and/or existing civil suit before the said court.

D **[30]** In pursuing this argument, the applicant relied on the case of *Dato' Sabariah Sabtu v. Peguam Negara & Ors and Other Appeals* [2016] 7 CLJ 655, which held:

27. The principle of law is settled that a notice of motion cannot stand on its own (see *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289; [2014] 6 MLJ 831). **A notice of motion, similar to a summons in chambers, is a subsidiary process which drew its life from the originating process** (see *Abdul Rashid Maidin & Ors v. Lian Mong Yee* [2008] 1 CLJ 1; [2008] 1 MLJ 469). **In the instant appeal, the originating process was the criminal proceeding against the third respondent and the directors**. When the criminal proceeding was disposed of, the cause of action was extinguished. The third respondent company and the directors having been discharged not amounting to an acquittal and there being no intention on the part of the second respondent to recharge them, clearly there was no criminal proceeding pending to enable the High Court in its criminal jurisdiction to make orders on the delivery of the seized properties.

(emphasis added)

[31] I agree therefore with the contention of learned counsel for the applicant that in this case, the originating process was the criminal charges brought against the applicant. This resulted in the Sessions Court exercise of its criminal jurisdiction and not its civil jurisdiction the latter of which would entitle a declaration to be issued.

[32] The first respondent's notice of application was a mere subsidiary process and must have had as its basis or foundation an originating process of some kind or other. Logically it cannot stand on its own. It must be anchored to an originating process.

[33] As no civil originating process was invoked by the Sessions Court upon the application of the first respondent, the order made by the Sessions Court in the exercise of its criminal jurisdiction in granting the reliefs were therefore *ultra vires* and wrong in law.

Applicant Not Cited As Party

[34] It was also submitted that although the applicant was a person whose legal rights were clearly and directly affected by the order, he was not cited as a party in the proceedings.

[35] In this respect, learned counsel for the applicant cited the case of *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64, where the court held:

> The plaintiff has by his Originating Summons sought a declaration. **It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declarations can serve no useful purpose**: See *Mellstrom v. Garner & Ors* [1970] 2 All ER 9.
>
> The learned Attorney-General has referred to a textbook on Declaratory Orders, 2nd Edition, by P.W. Young, on *the conditions for declaratory orders and has submitted that one of the conditions to be satisfied is that (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility*.
>
> "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; **he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought**." (*The Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438 at 448 per Lord Dunedin). (emphasis added)

[36] See also *Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1987] 2 CLJ 36; [1987] CLJ (Rep) 504; [1988] 2 MLJ 604.

[37] As it was evident that the applicant whose rights were affected had a true interest in opposing the declaration sought, it was therefore necessary for the respondents to have named the applicant as a party. As this was not done, the declaration served no useful purpose.

[38] In any event, the SCJ had no jurisdiction to grant the orders that he did, for the reasons stated above.

No Sufficient And/Or Correct Intitulements In The First Respondent's Application

[39] In the notice of application filed before the Sessions Court, apart from citing that the matter was before the Special Corruption Sessions Court "Mahkamah Sesyen Khas Rasuah", the arrest case number and that the

matter was between the Public Prosecutor and the applicant, there were no other intitulements. There were no references made to any provisions of law including the Criminal Procedure Code ("CPC").

[40] In submitting that the application filed by the first respondent had stated no or no sufficient intitulements and therefore defective, the applicant cited a trilogy of cases beginning with *Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 MLJ 457, which held:

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O. 89. *The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement.* Now, I think that *that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it*? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then *a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation*. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.
>
> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to *the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and be may be liable to be struck out, unless sooner amended*. (emphasis added)

[41] In the Court of Appeal case of *Ketua Pengarah Imigresen Malaysia lwn. Heng Peo* [2007] 2 CLJ 111; [2007] 3 MLJ 97, it was held:

> [13] Kami bersetuju dengan hujah Peguam Kanan Persekutuan, En Mohamad Hanafiah bin Zakaria bagi pihak responden bahawa tidak terdapat tajuk-tajuk perkara atau 'intitulements' yang mencukupi dan betul dinyatakan kepada permohonan pemohon tersebut. Juga sekiranya terdapat tajuk-tajuk perkara dinyatakan sekalipun ianya tidak menyokong perintah-perintah atau relif yang dipohon oleh pemohon. Tajuk-tajuk perkara kepada permohonan pemohon tersebut ada menunjukkan beberapa undang-undang statut atau kaedah-kaedah yang pihak pemohon bergantung kepadanya. *Walau bagaimanapun tajuk-tajuk perkara tersebut gagal menyatakan peruntukan undang-undang atau kaedah-kaedah mahkamah yang betul dan bersesuaian yang mana permohonan tersebut dibuat atau dibenarkan dibuat*. (emphasis added)

[42] In *Uthayakumar Ponnusamy v. YAB Dato' Sri Najib Tun Razak, Perdana Menteri Malaysia & Ors* [2017] 6 CLJ 297, the Court of Appeal held:

> [14] The appellant had submitted that the issue of intitulement was a minor irregularity which could be cured. We disagreed with the appellant.
>
> ...
>
> [16] The principle in *Cheow Chew Khoon (supra)* and *Heng Peo (supra)* applies squarely to the present appeal. We noted that while there was a reference to the CPC in the application in *Heng Peo (supra)*, *here the application was absolutely silent either in the heading of the application or in its body as to the statute or the rule of court under which the application was made.*
>
> (emphasis added)

[43] In taking the argument a bit further, learned counsel for the applicant also submitted that the orders/reliefs prayed for were not within the matters allowed under the CPC.

[44] In this regard, reliance was also placed on the following passage from the case of *Uthayakumar Ponnusamy v. YAB Dato' Sri Najib Tun Razak, Perdana Menteri Malaysia & Ors (supra)* as follows:

> [17] Further, it must be kept in mind that the application was filed as a miscellaneous criminal application and that the law governing criminal procedure is the CPC. As such, the appellant must conform to the provisions of the CPC in making the application, that is to say, the reliefs prayed for must fall within the matters allowed under the CPC. However, we found nothing in the CPC to support the application for the above reliefs.

[45] It was therefore quite clear that as there was nothing in the intitulement nor in the CPC upon which to hinge the applicant's application, it must therefore fall like the proverbial deck of cards.

Rights Of Counsel Holding A Watching Brief

[46] The application made by the first respondent's counsel was done after the Sessions Court allowed the said learned counsel's application to hold a watching brief in the criminal case.

[47] Now, what exactly are the rights and status of a party holding a watching brief? The answer is to be found in the judgment in the case of *MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No. 12)* [1998] 4 CLJ 906; [1999] 1 MLJ 139, which held:

> there is a great difference between holding a watching brief and having a *locus standi*. **In respect of the former, a party applying is invariably not a party to the suit and counsel given such leave to sit in the proceedings will have no say at all, save and except at the invitation of the court**. (emphasis added)

[48] Further guidance on this issue can be found in the illuminating article by former Court of Appeal Judge, Datuk Mahadev Shankar JCA titled "*Watching Briefs ... Indulgence, Right or Potential Estoppel*?" [1991] MLJ clxi where he wrote:

> In a trial whether criminal or civil, the only persons directly concerned with the process are the combatants. Only they have the right to tender evidence and make submissions. They alone will be bound by the orders of the judge and become liable for the costs of litigation.
>
> In such a scenario a watching brief has no right whatsoever to do anything except watch the proceedings. He cannot be permitted to lead evidence nor can he question any of the witnesses. Nor can he address the judge on the merits of the case. All this for the simple reason that his client is not a party to the dispute, even if he has an interest in the outcome.

[49] A combined perusal of the above references will indicate that unless invited to do so at the behest of the court, a party holding a watching brief cannot address the court and his role is confined strictly and defined by the very expression "watching brief" itself and that is to merely watch or observe proceedings notwithstanding his interest in the outcome.

[50] This being the case, it was patently wrong for the SCJ to have entertained the first respondent's application let alone to have allowed such application. The issue very simply is one of *locus standi* which a party holding a watching brief does not possess.

The Prosecutorial Discretion Of The Attorney General

[51] This issue is intertwined with the previous issue regarding the rights of a party in holding a watching brief.

[52] The powers of the Honourable Attorney General ("AG") are found in art. 145 of the Federal Constitution which reads:

> 145. Attorney General
>
> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

[53] Section 376 of the Criminal Procedure Code (CPC) states:

> 376. Public Prosecutor
>
> (1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

[54] In *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; [1991] 2 MLJ 544, the then Supreme Court held:

> Article 145(3) of the Federal Constitution states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than

proceedings in the Syariah Court etc. The discretion of the Attorney General is unfettered and cannot be challenged and substituted by that of the courts.

[55] In *Bar Malaysia v. Peguam Negara Malaysia & Anor* [2017] 1 LNS 578; [2016] MLJU 1597, it was held:

> [27] I have analysed the authorities submitted by both parties and I agreed with the submissions of the Senior Federal Counsel that the effect and meaning of Article 145(3) has been settled by long line of decisions of the Apex Courts. These courts have held that the decision of the AG to institute or not to institute criminal proceedings is not justiciable or amenable to judicial review.
>
> [28] It must be stressed that the AG is expected to act honestly and without fear and favour. However the avenue of the person being unhappy with his decision is elsewhere and not to the court.

[56] In *Datuk Mohd Zaid Ibrahim v. Peguam Negara Malaysia* [2016] 1 LNS 1817; [2017] 9 MLJ 502, the court held:

> The effect and meaning of art 145(3) of the Constitution had been settled by long line of decisions of the apex courts. These courts had held that the decision of the AG to institute or not to institute criminal proceedings was not justiciable or amenable to judicial review.

[57] The absolute discretion of the AG to institute criminal proceedings or otherwise was also affirmed in *Khairuddin Abu Hassan v. Tan Sri Mohamed Apandi Ali* [2017] 4 CLJ 761; [2017] 9 MLJ 441.

[58] Learned counsel for the applicant thus submitted that since the discretion of the AG is absolute, no other party including the first respondent even as a complainant has the requisite *locus standi* in respect of the prosecution of criminal cases or in any other capacity for that matter in criminal cases, save as allowed by law.

[59] Learned counsel for the first respondent on the other hand, submitted the Indian High Court case of *Smt Rama Sharma v. Pinki Sharma And Ors* 1989 Cri LJ 2153, where it was held that a complainant has *locus standi*. The issue before the court in that case was whether the complainant had *locus standi* to file for revision. In holding that the complainant has *locus standi*, the court held that the contention about the non-maintainability of the application due to the lack of *locus standi* was not tenable.

[60] Learned counsel for the applicant in countering this, submitted that the absolute prosecutorial discretion of the AG in Malaysia makes the position different from that in India. In India, it was submitted, the Magistrate is the determining authority with regard to the institution of criminal cases and accordingly gives certain directions pertaining thereto.

[61] The position in India was in fact discussed in *Khairuddin bin Abu Hassan v. Tan Sri Mohamed Apandi Ali* (sued in his capacity as the appointed 'Attorney General') (*supra*) where the court held:

> [22] It must be noted that the Federal Court in *Johnson Tan* case had also considered the Indian position and held as follows:
>
> *The corresponding art. 76 of the Indian constitution dealing with the Attorney General in India does not contain a similar provision, merely providing by clauses (2) and (3) that:*
>
> *(2) It shall be the duty of the Attorney General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this constitution or any other law for the time being in force.*
>
> *(3) In the performance of his duties the Attorney General shall have right of audience in all courts in the territory of India.*
>
> *[23] It is pertinent to note that Indian decisions do not apply in Malaysia. There is no similar provision as our art. 145(3).*
>
> [24] I have analysed the authorities submitted by both parties and in my view the effect and meaning of art. 145(3) has been settled by long line of decisions of the apex courts. These courts have held that the decision of the AG to institute or not to institute criminal proceedings is not justiciable or amenable to judicial review.
>
> (emphasis added)

[62] It is to be noted that unlike the position in India, the discretion of the AG in Malaysia is not similarly circumscribed and India has no similar provision as our art. 145(3).

[63] I therefore agree with the contention of learned counsel for the applicant that the position in India is very different from here. Further, the position in India is in conflict with the decision in *MBf Capital Bhd & Anor v. Tommy Thomas & Anor And Other Suits (supra)* and the sentiments expressed in the earlier referred article by Mahadev Shanker (JCA) titled "*Watching Briefs ... Indulgence, Right or Potential Estoppel*?"

[64] To take a practical example, assuming there arose a situation where a complainant lodges a police report against a person but later wishes to retract or withdraw as it were the report either because he or she no longer desires to proceed with the matter for whatever reason or may have settled the matter privately with the offender.

[65] In such circumstances, it is no bar for the AG to nevertheless proceed with the prosecution should he deem fit notwithstanding whatever plea the complainant may venture forth in order to drop the matter. Such is the discretion of the AG in such matters.

[66] A necessary corollary of the absolute prerogative of the AG to prosecute is that as a general rule, private persons or entities do not have the *locus standi* to institute criminal prosecutions or proceedings or be involved in any manner save as provided for. Much less so a party holding a watching brief.

[67] The one notable exception to this, as learned counsel for the applicant pointed out, is in s. 41(1) of the Extradition Act 1992, which states:

> Any barrister, advocate and solicitor or legal officer in the employment of the government of any country may with the written authorisation of the Public Prosecutor appear on his behalf in any proceedings under this Act.

[68] In *PP v. Ottavio Quattrocchi* [2004] 3 CLJ 553; [2004] 3 MLJ 149, the authorisation of the Public Prosecutor referred to in the subsection for learned counsel to appear on his behalf was however interpreted by the High Court to refer to persons '... in the employment of the Government of any country ...'. In the premises, the court declined to accept the authorisation of the Public Prosecutor. Counsel was however permitted to assist as *amicus curiae*.

[69] Applications, in civil or criminal proceedings, may only thus be brought where the party has either (i) *locus standi* to institute those proceedings (the sufficient interest requirement) see *Caxton Kelang Sdn Bhd v. Susan Joan Labrooy & Anor (supra)*, (ii) is statutorily prescribed by the authority to institute/participate in those proceedings or (iii) is defending itself/himself in those proceedings.

[70] The first respondent therefore did not have *locus standi* before the Criminal Sessions Court. It therefore stands to reason that if the first respondent does not possess the necessary *locus standi* to institute a criminal prosecution, it cannot also possess any authority or *locus standi* to make any application for any declaratory reliefs as they did here.

[71] The combination of this and their limited scope and status as a party holding a watching brief would therefore make the reliefs given by the Sessions Court plainly wrong in law.

Is The Statement Of The Applicant Under s. 53(1) Of The Malaysian Anti-Corruption Commission Act 2009 ("MACC") A Privileged Document?

[72] Learned counsel for the applicant submitted that the statement of the applicant was taken pursuant to the combined operation of ss. 10(4)(b), 10(5), 30 and s. 53(1) of the Malaysian Anti-Corruption Commission Act 2009 ("MACC") read together with s. 113 of the Criminal Procedure Code ("CPC").

[73] Under the MACC, the powers of an officer of the Commission are set out in s. 10(4)(b) and s. 10(5) of the MACC respectively. These sections read:

Section 10(4) (b):

(4) For the purpose of this Act:

(a) …

(b) **An officer of the Commission shall have all the powers conferred on an officer in charge of a police station under any written law**, and for such purpose the office of such officer shall be deemed to be a police station

Section 10(5):

For the avoidance of doubt, it is declared that for the purposes of this Act **an officer of the Commission shall have all the powers of a police officer of whatever rank as provided for under the Criminal Procedure Code** and the Registration of Criminals and Undesirable Persons Act 1969 [Act 7], and such powers shall be in addition to the powers provided for under this Act and not in derogation thereof, but in the event of any inconsistency or conflict between the provisions of this Act and those of the Criminal Procedure Code, the provisions of this Act shall prevail.

[74] The relevant "powers" referred to in these sections are the recording of a caution statement by an officer of the Commission, of a person acquainted with the facts and circumstances of the case, under investigation and this is pursuant to s. 30 of the MACC which reads:

(1) An officer of the Commission investigating an offence under this Act may:

(a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence.

...

(3) A person to whom an order has been given under paragraph 1(a) shall -

…

(b) during such examination, disclose all information which is within his knowledge, or which is available to him, in respect of the matter in relation to which he is being examined, and answer any question put to him truthfully and to the best of his knowledge and belief, and shall not refuse to answer any question on the ground that it tends to incriminate him or his spouse.

…

(8) An officer of the Commission examining a person under paragraph 1(a) shall record in writing any statement made by the person and the statement so recorded shall be read to and signed by the person, and

where such person refuses to sign the record, the officer shall endorse thereon under his hand the fact of such refusal and the reasons therefor, if any, stated by the person examined.

[75] The powers of a police officer in recording a statement under s. 112 of the CPC reads:

112. Examination of witnesses by police

(1) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

[76] It will be noted that the powers of an officer of the Commission are similar and equivalent to those of a police officer under s. 112 of the CPC.

[77] Section 53(1) of the MACC reads:

In any trial or inquiry by a court into an offence under this Act, any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of an investigation or not and whether or not wholly or partly in answer to question, by an accused person to or in the hearing of any officer of the Commission, whether or not interpreted to him by any other officer of the Commission or any other person, whether concerned or not in the arrest of that person, shall, notwithstanding any written law or rule of law to the contrary, *be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit*.

[78] The position in the CPC with regard to admission of statements in evidence is governed by s. 113 which reads:

113. Admission of statements in evidence:

(1) Except as provided in this section, **no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence**.

(2) ...

(3) Where the accused had made a statement during the course of a police investigation, such statement may be admitted in evidence in support of his defence during the course of the trial.

[79] It will be also noted that s. 113 of the CPC is inconsistent with s. 53(1) of the MACC only insofar as s. 113 prohibits the usage of any statements taken under s. 112 of the CPC in evidence, whereas s. 53(1) renders any such statements admissible at the applicant's trial in evidence. Only to that extent will the provisions of the MACC prevail over the CPC.

[80] The only circumstance in which a statement made under s. 112 of the CPC may be disclosed is by the defendant for his defence in his criminal trial but for no other purpose. In other words, only the accused can utilise the statement for the purposes of his defence. See s. 113 CPC.

[81] There is good authority that statements made under s. 112 are privileged documents. In this regard, learned counsel for the applicant referred to the case of *Martin Rhienus v. Sher Singh* [1949] 1 LNS 49; [1949] 1 MLJ 201, which in turn referred to the Indian case of *Methuram Dass v. Jaggannath Dass* (1901) ILR 28 Cal 794, and held as follows:

> I agree with that decision and the reasoning for it.
>
> The question was raised by the Court whether the provisions of section 113 of the Criminal Procedure Code prevent a statement made under section 112 from being given in evidence at all, even in civil proceedings, **but having decided that statements made under section 112 are absolutely privileged it is not necessary for me to decide this further question**. Nor, having found that the statement in this case was made under section 112 is it necessary to decide whether information to the police under section 107 is, or is not, absolutely privileged. (emphasis added)

[82] Learned counsel for the applicant also referred to the case of *Husdi v. PP* [1979] 1 LNS 33; [1979] 2 MLJ 304 which held as follows:

> The purpose of the police officer taking these statements is merely to collate evidence relating to circumstances surrounding the offence alleged in the first information, and also to determine whether or not there is insufficient or further evidence to prosecute the accused person. On completion of investigation, the investigating officer is required by law to report to the public prosecutor. See section 120 Criminal Procedure Code. On the first information, police statements and other evidence, the Public Prosecutor decides whether or not to prosecute. **By the very nature of the actions taken, police statements belong to a special class** ... And it must be noted that even if such a statement is to be used for impeachment, it must be proved, unless the witness to be impeached admits to having made such statement ...
>
> Considering the provisions in the Criminal Procedure Code and the Evidence Act, I can find no provision which is construable as giving a right to inspect a police statement ...
>
> **But, for the purpose of the present case, we are only concerned with the ruling that a police statement is a privileged document**. The Court of Appeal here has followed the Indian decision ...
>
> These two cases involve actions for defamation. *But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.*

> For the foregoing reasons, in the circumstances shown in the present application, the defence is not entitled to be supplied with police statements. (emphasis added)

[83] *Husdi*'s case establishes that the privilege attached to a statement taken during the course of police investigations arises from the very nature of the action taken by the police.

[84] If statements taken under s. 112 of the CPC by police officers are subject to absolute privilege and the powers accorded to officers of the Commission under the MACC are similar and equivalent to the powers of a police officer under the CPC, it only stands to reason that the statement of an accused under s. 53(1) of the MACC is also absolutely privileged.

[85] The court in *Husdi*'s case additionally held:

> "Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses." - is essentially a common law plea of **public interest immunity** or commonly known as Crown privilege.
>
> (emphasis added)

[86] The fact that the document amounts to a public document under s. 74 of the Evidence Act 1950 does not *per se* make it admissible as s. 74 merely describes the document and does not deal with its admissibility as the following passage from *Husdi*'s case indicates:

> *On the face of it, a police statement falls under section 74 of the Evidence Act, as it is a document forming the act of a public officer. Simply because a document is the act of a public officer does not give a person, interested or otherwise, a right to inspect. Section 76 of the Evidence Act merely relates to the manner of certification. It is not an enactment which confers any right. It presupposes the existence of the right to inspect*. The opening part of the section reads "Every public officer having the custody of a public document which any person has a right to inspect. …" *The right to inspect a police statement, which is a statutory, not common law, creature, would depend on the construction of the relevant provisions, particularly those under the Criminal Procedure Code.* (emphasis added)

[87] See also *Dato Yap Peng v. PP* [1993] 2 CLJ 181; [1993] 1 MLJ 337, which held:

> With the greatest respect to her, **in my view, s. 74 only provides the categorising of a public document and nothing more than that**. Section 78 of the Evidence Act 1950 is only for the purposes of certification of a public document. The purpose of categorising and the certificate is to make it easier for its production without the necessity of calling the maker or the keeper of such document to give in evidence to prove the existence of such document. In my view, that is the only purpose of ss. 74 and 78 of the Evidence Act 1950. **The relevancy and the admissibility of such a document is governed by the provisions of other sections of the Act or**

A **other laws**. In my opinion, before such document could be admitted, the conditions and prerequisites of the section under which it is to be used must be satisfied. (emphasis added)

[88] Section 53(1) of the MACC states that the statement can only be used in any "trial or inquiry by a court into an offence under this Act". I agree B with the submission of learned counsel for applicant that this attracts the application of the maxim of construction, *expressio unius est exclusio alterius*, namely the express mention of one matter, implies the exclusion of matters which have not been mentioned. The application of this maxim would thus exclude the statement from being utilised for any other purpose than that C expressly mentioned.

[89] In the final analysis, pursuant to s. 53(1) of the MACC, the statement is only admissible at the trial of the applicant and, if he tenders himself as a witness, the statement may be used in cross-examination and for the purpose of impeaching his credit. The trial referred to means the trial of the D applicant at the Criminal Sessions Court and not in any other court.

[90] I therefore hold that the statement given by the applicant pursuant to the combined provisions of ss. 10(4)(b), 10(5), 30 and 53(1) of the MACC read together with s. 113 of the CPC are similarly, absolutely privileged. The statement therefore cannot be used at the trial in the Civil High Court.

E

[91] Once such public interest immunity attaches to a document, it cannot be waived at will by either party in the criminal proceedings. In *Makanjuola v. Commissioner of Police of the Metropolis* [1992] 3 All ER 617, the Court of Appeal held:

F ... public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule imposed on parties in certain circumstances, even where it is to their disadvantage in litigation.

[92] The fact that the document was given in pursuance to s. 51A of the G CPC as submitted by learned counsel for the first respondent, makes no difference to the outcome. Section 51A of the CPC states as follows:

51A. Delivery of certain documents

(1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:

H

(a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;

(b) **a copy of any document which would be tendered as part of the evidence for the prosecution; and**

I

(c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

[93] It is to be noted that under s. 51A CPC, apart from the first information report under sub-para. (a), documents which the prosecution are obliged to provide to the accused are copies of documents which the prosecution would tender as part of their case.

[94] Now, a statement made by an accused under s. 53(1) MACC may or may not be used by the prosecution as part of their case although the right to so use it is not denied especially if the need arose to impeach the testimony of the accused.

[95] So it is not in all cases that the statement made under s. 53(1) MACC would be supplied by the prosecution as such a document may not be tendered as part of the evidence for the prosecution.

[96] Therefore, it cannot be contended that the statement of the accused under s. 53(1) MACC would necessarily be provided by the prosecution under the provisions of s. 51A CPC. In any event, even if such statement were to be supplied in accordance with s. 51A, it would be to the accused person only. It has already been established that a party to a watching brief or even a complainant has no *locus standi* in criminal proceedings in the light of the absolute prosecutorial discretion of the AG.

[97] A complainant would have no right to such document even under s. 51A CPC. Therefore, the fact that the document was supplied under s. 51A of the CPC does not advance the case of the first respondent as he had no right to it anyway.

There Is No Mechanism Available In The High Court For Determining The Voluntariness Of The Statement

[98] Section 53(2) of the MACC provides:

> No statement made under subsection (1) shall be admissible or used as provided for in that subsection if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the person ...

[99] This is but a statutory form of the "old as the hills" common law principle that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. See *Ibrahim v. R* [1914] AC 599.

[100] The following cases have also adopted a similar principle namely, *Director of Public Prosecutions v. Ping Lin* [1975] 3 All ER 175, *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2003] 4 CLJ 409; [2004] 1 MLJ 177, *Lim Kiang Chai v. PP* [2014] 3 CLJ 102; [2014] 3 MLJ 358 and *Dato Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 to name but a few.

[101] The manner in which such voluntariness or otherwise of the statement is tested is by way of holding a trial within a trial or a *voir dire* before the judge. In the old days, the jury would have to be excluded for this purpose and the judge would be the sole arbiter on the admissibility of the statement. Fast forward to present times and it is a judge sitting alone who is to determine this question.

[102] Now, it is evident that a High Court engaged in the exercise of its civil jurisdiction cannot determine the admissibility of such a statement simply because quite apart from the fact that no mechanism exists for the purpose, such an issue is also not relevant to a civil trial. It would however, be relevant before a criminal court in which the accused is being tried and the issue of voluntariness of the statement arises.

[103] In those circumstances, the Sessions Court hearing the criminal matter would be able to hold a trial within a trial for the purposes of determining the admissibility of the statement given by an accused, the applicant in this case. As the High Court exercising its civil jurisdiction does not have the means of determining the voluntariness of the statement, it stands to reason that the statement cannot be used in a trial before the High Court hearing the civil matter.

[104] To allow the High Court to do so might also lead to the anomalous situation where the statement could be ruled inadmissible in the Criminal Sessions Court as it was not made voluntarily, but nevertheless admissible as evidence before the Civil High Court.

Decision

[105] The authorities referred to earlier have shown that the court's powers of revision are confined to cases where prevention or correction of a miscarriage of justice is necessary. This is one such case. The fact that the second respondent had no objection to the application and the first respondent's counsel was absent although there was proof of service made no difference as the Sessions Court had acted without jurisdiction in granting the orders.

[106] Upon a consideration of all the issues raised and the submissions advanced, this court therefore rules that the statement of the applicant given under s. 53(1) of the MACC is inadmissible before the High Court trial in Civil Suit No: 22NCC216-07-2015.

[107] I therefore exercise my revisionary powers and grant the reliefs sought for in the notice of motion. The decision of the Sessions Court made on 20 July 2017 is hereby set aside.